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NOV 26 1915

JAMES D. MAHER

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1915.

No. [REDACTED] 290

LOUISVILLE & NASHVILLE RAILROAD COMPANY,  
ET AL., APPELLANTS,

*versus*

UNITED STATES OF AMERICA, ET AL., APPELLEES.

Appellants' Reply Brief on Motion for an Order  
Maintaining Status Quo.

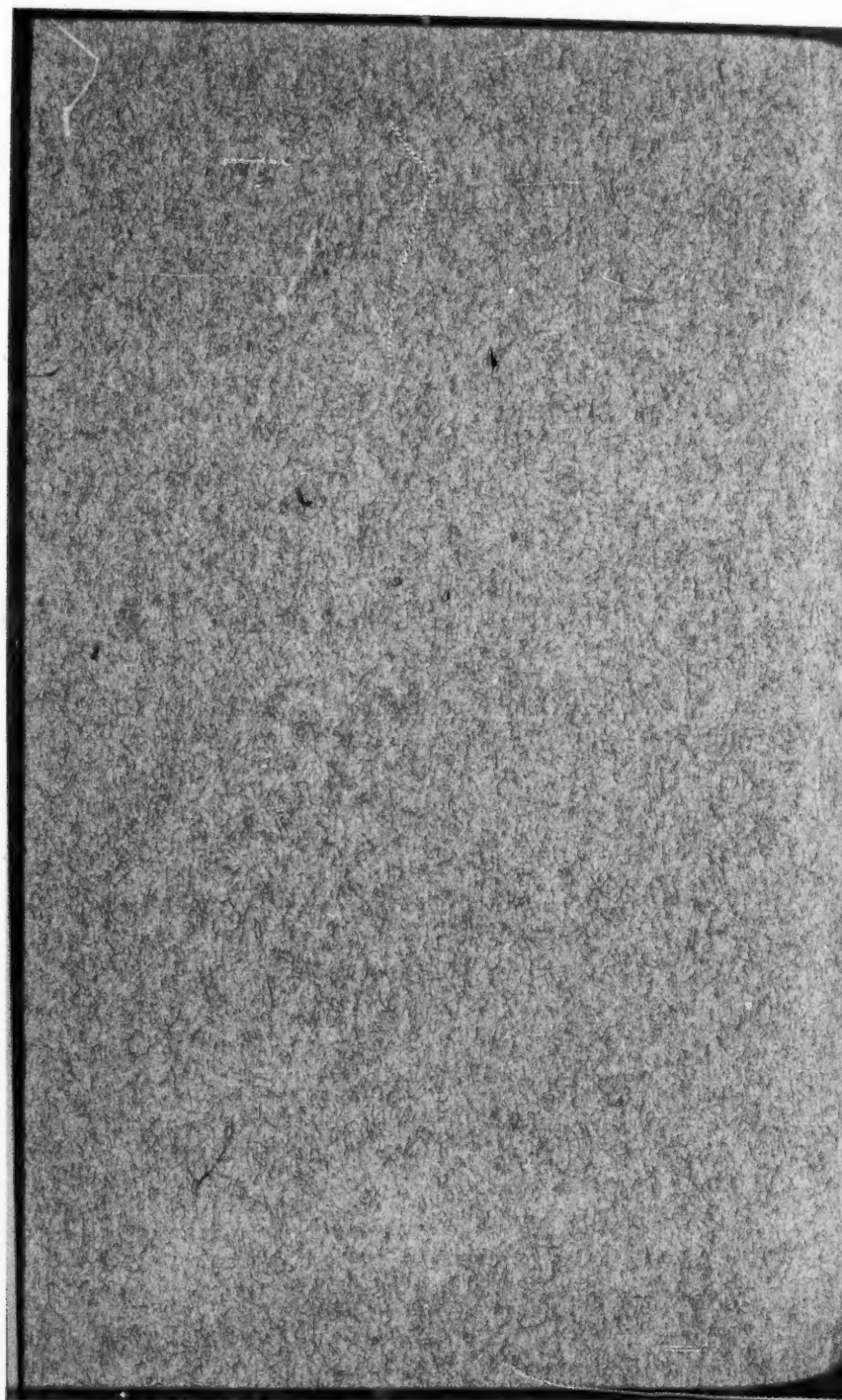
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Louisville, Ky., Nov. 24, 1915.



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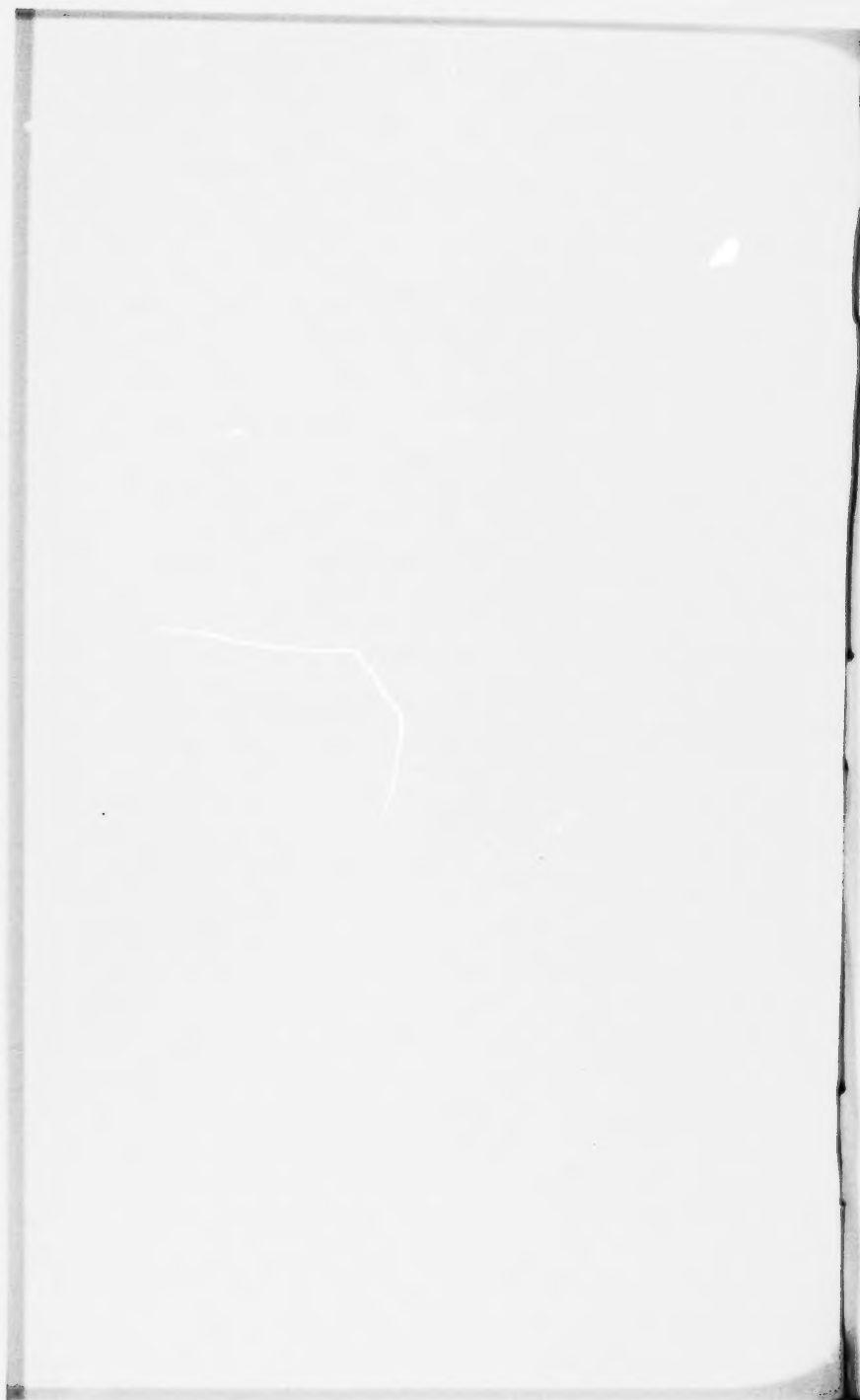
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# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1915.

No. 711.

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LOUISVILLE & NASHVILLE RAILROAD COM-  
PANY, ET AL., - - - - - *Appellants,*  
*versus*

UNITED STATES OF AMERICA, ET AL., - - - *Appellees.*

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## APPELLANTS' REPLY BRIEF ON MOTION FOR AN ORDER MAINTAINING *STATUS QUO*.

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In this reply to appellees' brief upon the motion for an order maintaining the *status quo*, the appellants will discuss the various propositions put forth by the appellees in the order of their presentation in the appellees' brief.

### I.

Has the **Exact Question Involved on this Appeal Been Decided by this Court?**

As foretold in our original brief, appellees insist that the question here involved is foreclosed by this court's decision in what is known as the Nashville Coal Case

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NOTE—Italics ours.

(238 U. S. 1). This is an evasion of the present contest and the raising of a collateral and improper issue as to the merits of which this record is necessarily silent, since there was no plea of former adjudication, nor other pleading, which would have given the appellants an opportunity to show the marked difference between the facts of the two cases.

The opinions, however, of the Commission, of the District Court and of this court, in that case, with slight reference to the record therein, show with sufficient definiteness how unlike they are.

There the principal contest related to certain important coal rates to Nashville from various mining points. As a manifestly subordinate addition to the main demand, there was a complaint that the L. & N. and N., C. & St. L. were discriminating against coal because under their tariffs they switched at Nashville all non-competitive freight for the Tennessee Central except coal. There was no complaint of a failure to switch *competitive* freight for the Tennessee Central (the issue in our case) on the ground that the two roads switched *competitive* freight for each other, or upon any other ground.

On the contrary, only the tariff relating to non-competitive freight (that is freight originating at or destined to points which the L. & N. and N., C. & St. L. did not reach) was in controversy, the claim being made that to switch non-competitive lumber, flour and other commodities and to refuse the same privilege to non-competitive *coal* was a discrimination against that commodity in violation of the Act.

The case was prepared and tried on these lines. The Commission, in its opinion, reduced the coal rates and also held the coal switching practice to be discriminatory. The railroad companies brought suit to enjoin the order and made application for an interlocutory injunction. Upon that preliminary motion the record of the proceedings before the Commission was not filed, because counsel conceived that the facts shown in the Commission's report itself did not as a matter of law justify the order. As to the switching question it was their opinion that even granting, for the sake of that motion, that the facts found by the Commission existed, the Commission had no authority over terminal movements because of the proviso to Section 3 of the Act, which seemed to withdraw from the Commission jurisdiction over terminals. The court held that assuming the Commission found the facts correctly, which, as stated, the railroads for the purposes of that motion did not controvert, there was a discrimination which came within the prohibition of the Act. This question never having been decided by this court, an appeal was taken on October 27, 1914. But on February 23, 1915, this court rendered its opinion in *Pennsylvania Company v. United States*, 236 U. S. 351, holding that it was a discrimination covered by the Act for the Pennsylvania Company, at Newcastle, Pa., to switch competitive freight for three railroads and to refuse the same service to a fourth. On the strength of this case the switching branch of the Nashville case was affirmed.

What was the fact found by the Commission which controlled both courts in their opinion and which appel-

lees ask shall control this court in this case? It was that the two railroads operated their individually owned tracks *independently* and *switched for each other*. This was not involved in that case, was not argued by the railroads and was not necessary to the decision of the question of commodity discrimination involved in that case. That declaration of the Commission was contained in a half-page introductory statement of the historical facts, which were not connected, as at all essential, with the subsequent argument of the Commission upon the question of discrimination against coal and which did not begin to show all the facts bearing upon the true relations of the two companies.

In the Commission's ten-page opinion, there is no discussion of this question of *switching for each other* (so vital in our case) and no reference even to it, except the following brief statement in the above-mentioned introduction:

"Both the Louisville & Nashville and the Nashville, Chattanooga & St. Louis *have individually owned tracks which they operated independently* each of the other or of the Terminal Company, and upon these tracks industries are located. To and from these industries as well as to and from those on the rails of the Terminal Company *traffic of all kinds is freely interswitched* by the Louisville & Nashville and the Nashville, Chattanooga & St. Louis."

We know from the present record that these companies do not operate their individually owned tracks independently, and we believe it to be equally clear that

the facts, which are uncontroverted, do not in law constitute a switching for each other.

That the District Court relied upon the above-quoted innocent statement is apparent from the quotations at page 24 of our brief. The same is true of this court's opinion. For example, referring to the Commission's order, this court said:

"It found that *each switched for the other* and both switched for the Tennessee Central, except as to 'coal and competitive business.' "

And in summing up its conclusion:

"In this case the controlling feature of the Commission's order is the prohibition against discrimination. It was based upon the fact that the appellants were at the present time *furnishing switching service to each other* on all business, and to the Tennessee Central on all except coal and competitive business."

Appellees now seek to bind this court and appellants to the adoption of a certain alleged fact as true, whose existence is here in issue, because in another and different case the parties saw fit, on a preliminary motion, to test the sufficiency in law of such alleged fact without denying its existence. This position is wholly untenable.

## II.

**Is the Order of the Commission Supported by  
Substantial Evidence?**

While the discussion of this question, being the meat of the whole case, comes in the final hearing rather than upon this preliminary motion, yet we will at this time briefly discuss the appellees' reference to it.

Counsel for appellees in considering the finding of the Commission of unjust discrimination, thus tersely states their whole case:

"The basis of that finding is the finding *that appellants switch for each other*, and that finding appellants insist is not supported by substantial evidence. The question is a very simple one. The appellants have pooled their terminals and have placed the operation of these terminals in the hands of their unincorporated joint agent called "Nashville Terminals," which switches for each of them. The sole question is whether or not the appellants by this *device* can avoid the charge of unjust discrimination, which it is conceded would exist but for the creation of the joint agency."

Under this important heading of their own making appellees offer no argument to show that what is done constitutes a switching for each other, but they raise another side issue—namely, that the arrangement at Nashville is a *device* to avoid the charge of discrimination; thereby conceding, as it were, that the arrangement would be lawful were it not a device designed to evade the law. There was not a scintilla of evidence in the record to show that this arrangement was a device

formed for the purpose of enabling each road to handle the cars of the other without handling those of the Tennessee Central. All the circumstances show exactly the contrary to be true.

1. The uncontroverted facts in this record, which indisputably disprove the unsupported statement of counsel that the existing arrangement between the appellants is a device, are numerous and they appear in the lower court's opinion (Vol. 1, pages 62-65) to which we invite this court's particular attention. They show that all the plans, negotiations, agreements, expenditures and final arrangements were completed *a year and a half before the Tennessee Central was built to Nashville and were begun many years before that event*, and that many other important results were purposed and achieved besides mere industrial switching. The following are some of these facts—all of them uncontroverted: The arrangement for joint trackage rights at Nashville between the two companies began as early as 1872 when the L. & N. acquired trackage rights for 99 years over some of the important terminal tracks of the other companies. This was long before the L. & N. had begun to acquire an interest in the N., C. & St. L.

In 1893, the appellants organized the Terminal Company with the purpose, as the lower court stated it, "to facilitate the construction of the proposed Union Station and other terminal facilities."

The Terminal Company acquired outright in its own name much valuable property, and on April 27, 1896, leased certain contiguous individually owned property

from the two constituent companies. Its own acquisitions, together with these leasehold interests, constituted the ground upon which were constructed the Union Station and principal terminal yards which comprise over 31 miles of main and side tracks. The two companies furnished the money, namely \$3,000,000, for the construction of the Union Station and main terminals, work upon which was begun in 1898 and finished in 1900.

Immediately after the completion of these main terminals the two companies entered into a written agreement of date August 15, 1900, under which they contributed to the main terminals (which they already owned jointly by 99-year lease from the Terminal Company), all of their individually owned terminal tracks within the switching limits of Nashville for their joint use for a period of 99 years. The same agreement also, almost of necessity, provided for their joint operation of these joint terminals for all terminal purposes, upon such division of the expenses that each, at the end of the month, pays for the service it receives and hence, in effect, performs its own terminal service.

It is this terminal arrangement (thus gradually built up with great foresight and at enormous expense to the constituent companies, and embracing not merely this single incidental feature of handling cars to and from industries, but also all other terminal services including the making up, and breaking up, of all trains, both freight and passenger, the handling of through as well as local cars, the operation of the Union Station, and the performance of all other terminal operations), which counsel

dispose of so cavalierly without other argument than the declaration that the whole thing is a "device to avoid the charge of unjust discrimination."

While the lower court nowhere suggested that any fact was proven which tended to show that this was a device, it was evidently influenced in its ultimate finding of a discrimination by the apprehension that to uphold the arrangement would enable other roads hereafter to carry on reciprocal switching "by the simple device of employing a joint agency to do such reciprocal switching." But here the court erred, as we think, both because each future case will be decided on its own facts and because there is much more involved at Nashville than the employment of a joint operating agency. Before that came the joint acquisition of the property, with its important vested rights and contractual obligations, the effects of which the court here largely nullifies when it orders either the discontinuance of the present joint uses and practices, or the admission of the Tennessee Central to an equal enjoyment of same—and the latter, forsooth not upon a proportionate contribution to the original cost, but for an insignificant switching charge, which in no way compensates for the loss of the road-haul revenue and the other unjust features of such a command.

If it be claimed that the final joint operating agreement was made after the coming of the Tennessee Central was foreseen, the answer is that the plans for it were begun nine years before, that the making of various joint arrangements calling for the joint expenditure of nearly three million dollars took place three years before,

and that, upon the completion of the improvements in 1900, the two companies had become so indissolubly bound together in the ownership of the valuable main terminal facilities that this making of their remaining individually owned terminals also joint, in both ownership and operation, was practically necessary to the proper enjoyment of their previously acquired joint property, to say nothing of the manifest economy and convenience of such an arrangement.

2. Another cogent reason why this arrangement could not have been a device was the fact that in 1900 there was no law which permitted the Commission to require one railroad to unite with another, even in the making of a joint through route. Joint routes were altogether matters of contract until the Commission was given authority itself to make them by the amendments of June 29, 1906, and June 18, 1910, to Section 15 of the Act to Regulate Commerce.

Furthermore, there had been no cases up to that time which applied the principle of discrimination to terminal movements. The holding of the courts was precisely to the contrary and these decisions are still the law in the case of *bona fide* contracts such as we have here, though this court has held, under the amendments of 1906 and 1910, that the Commission now has power to prevent a naked discrimination even in connection with terminal movements. A glance at some of these cases is pertinent here, not only because they sustain the validity of the contracts of 1900 and those of the previous dates, but also because they show that there could have been no

need of any device at that early date to avoid the charge of discrimination in terminal practices.

In *K. & I. Bridge Co. v. L. & N. R. R. Co.*, 37 Fed. 567, in which the K. & I. Bridge Co. sought and obtained from the Commission an order requiring the L. & N. R. Co. to interchange freight at a certain point of physical connection between the two roads, Circuit Judge Jackson, in declaring said order void because, among other reasons, it was a *violation of the tracks and terminals proviso to Section 3* of the Act, expressly held that private contracts (such, for example, as the one between the L. & N. and N., C. & St. L. now under discussion) were not prohibited by the Act, saying:

“The third section prevents the making or giving of any undue or unreasonable preference or advantage to any firm, company, person, corporation, locality, or traffic, or the subjecting of any person, company, firm, corporation, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage; and by its second clause requires common carriers to afford all reasonable and proper and equal facilities for the interchange of traffic, and for the receiving, forwarding, and delivering of passengers and property between their lines and those connecting therewith, and prevents them from discriminating in their rates and charges between such connecting lines, but without requiring any such common carrier ‘to give the use of its tracks and terminal facilities to another carrier engaged in like business.’ Now, under this last limitation upon, or qualification of, the duty of affording all reasonable, proper and equal facilities for the interchange or for the receiving, forwarding, and delivering of traffic to and from and between connecting lines, it is clearly left open to any common carrier to contract

*or enter into arrangements for the use of its tracks and terminal facilities with one or more connecting lines, without subjecting itself to the charge of giving an undue or unreasonable preference or advantage to such lines, or of discriminating against other carriers who are not parties to, or included in, such arrangements. No common carrier can therefore justly complain of another that it is not allowed the use of that other's tracks and terminal facilities, upon the same or like terms and conditions which, under private contract or agreement, are conceded to other lines."*

This doctrine was adhered to in an opinion by Circuit Justice Field in *Oregon Short Line & U. N. R'y Co. v. Northern Pacific R'y Co.*, 51 Fed. 465 (affirmed by the C. C. A. in 61 Fed.), where he said:

"The provision in the second subdivision of the third section of the Interstate Commerce Act, that a common carrier shall not be required to give the use of its tracks and terminal facilities to another carrier engaged in like business, is a limitation upon or qualification of the duty declared of affording all reasonable, proper and equal facilities for the interchange of traffic, and the receiving, forwarding and delivering of passengers and property to and from the several lines and those connecting therewith. It was so expressly held in the case above cited of *Kentucky & I. Bridge Co. v. Louisville & N. R. Co.*, 37 Fed. Rep. 571.

"It follows from this, as it was decided in that case, that a common carrier is left free to enter into arrangements for the use of its tracks or terminal facilities with one or more connecting lines, without subjecting itself to the charge of giving undue or unreasonable preferences or advantages to such lines, or of unlawfully discriminating against other carriers. In making arrangements for such use by

other companies, a common carrier will be governed by consideration of what is best for its own interests. The act does not purport to divest the railway carrier of its exclusive right to control its own affairs, except in the specific particulars indicated."

And so in *Little Rock & M. R. Co. v. St. Louis, I. M. & S. R'y Co.*, 59 Fed. 400, where the court, after discussing the proviso to Section 3 and the previous decisions on the subject, held among other things "that the fact that one connecting railway company has a contract for the interchange of interstate commerce freight, which involves the use of the receiving railway's tracks and terminal facilities, would not authorize a court of equity to compel the receiving railway to grant a like contract or concession to another connecting company."

This case was affirmed by the United States Circuit Court of Appeals for the Ninth Circuit in an opinion by Judge, now Justice, McKenna.

3. This court, as late as 1912, has distinctly approved the plan of independent companies combining for the purpose of controlling or acquiring terminals for their common but *exclusive* use. This is definitely declared in *United States v. Terminal Railroad Ass'n of St. Louis*, 224 U. S. 383, where the court, through Mr. Justice Lurton, at page 405, said:

"It can not be controverted that, in ordinary circumstances, a number of independent companies might combine for the purpose of controlling or acquiring terminals for their common but *exclusive* use. In such cases other companies might be admitted upon terms or excluded altogether. If such terms were too onerous, there would ordinarily re-

main the right and power to construct their own terminals. But the situation at St. Louis is most extraordinary, and we base our conclusion in this case, in a large measure, upon that fact."

It is true that this court in that case, to an extent, condemned the method of organization of the Terminal Railroad Association as a violation of the Sherman Act, and required it to be reorganized so as to provide a definite way for new railroads to be admitted into the company; but this finding was expressly made to rest upon the peculiar situation at St. Louis, which the court thus described:

"The result of the geographical and topographical situation is that it is, as a practical matter, impossible for any railroad company to pass through, or even enter St. Louis, so as to be within reach of its industries or commerce, without using the facilities entirely controlled by the Terminal Company."

This case came back to the Supreme Court on appeal from the order carrying out its mandate and the court in 1915, in approving the plan of reorganization under which other railroads could come in on equitable terms, reaffirmed the doctrine of the former opinion that, except in a peculiar case like that at St. Louis, it was lawful for independent carriers to combine for the purpose of obtaining terminal facilities. (236 U. S. 206.) But even in St. Louis the railroad desiring to come in did not do it for a switching charge but was required to pay its equitable proportion of the cost and maintenance of the property.

4. In this connection, as bearing upon the Commission's general idea of this Nashville situation, it is significant that the Commission in the Nashville Coal case got around this joint arrangement by taking as a precedent the action of the court in the above St. Louis Terminal Company case.

After announcing its conclusion that the practice of the L. & N. and N., C. & St. L. was unjustly discriminatory and declaring that they should be required to discontinue it, the Commission said:

"This disposition of the case is in consonance with the principle enunciated by the Supreme Court in *U. S. v. Terminal R. R. Asso. of St. Louis*, 224 U. S. 383."

Such a conclusion was unjustified both because the Commission has no power to administer the Sherman Act and because, if it had, the monopolistic geographical conditions existing at St. Louis did not exist at Nashville, where the Tennessee Central was not only not excluded but was doing business with extensive terminals of its own throughout the city, and had never made a complaint to Commission or court.

### III.

#### **Irreparable Injury.**

Counsel disposes of the testimony of A. R. Smith and Chas. Barham, leading traffic officials of appellants, that the two companies would sustain a net loss of \$16,000 per month, if the Commission's order is put into effect, by declaring it to be "purely speculative"; but he does not point out any flaws in either the facts or the logic of their statements. Each shows the number of competitive cars of freight handled annually by the road he represents together with the net earnings thereon. It is then shown that the Tennessee Central connects with the Southern Railway system, and with the Illinois Central. The aggregate mileage of the Southern Railway and its allied lines is shown to be 10,171 miles and that of the Illinois Central 6,141 miles.

It will be understood that the freight under consideration is competitive freight, that is freight from or to points of origin or destination which the Tennessee Central and its allied lines can reach as well as the L. & N. and N., C. & St. L. It is further stated that the aggregate number of freight solicitors in the employ of the Illinois Central, Southern Railway, Queen & Crescent and Tennessee Central (not counting those of the Southern Railway's other allied interests) total 323, whereas the freight solicitors of the L. & N. and N., C. & St. L. aggregate 130. These 323 solicitors, scattered over 16,312 miles of railroad, to say nothing of their con-

nections, will have a chance at every car of freight going to Nashville, if it is known throughout the country that those lines can deliver upon the L. & N. and N., C. & St. L. terminals as well as can the owners of those terminals. The rate being the same, this request for a division of business will undoubtedly meet with many favorable responses. Mr. Smith estimates that 25% of the inbound competitive traffic would thus be diverted to the Tennessee Central and its connections and that the solicitation of the local men at Nashville, backed by the known interest of the city of Nashville as a stockholder in the Tennessee Central, would divert 15% of the outbound competitive traffic. These figures appear upon their face to be entirely conservative. They represent the deliberate judgment of the two men, who, best of all others, are qualified to speak upon the subject; and their testimony is wholly uncontroverted. Mr. Smith's statement as to how this would work is pertinent here (Record, Vol. 1, page 48):

"Should reciprocal switching be practiced at Nashville, whereby the Tennessee Central R. R. will have access to all industrial side tracks on the Louisville & Nashville R. R., or those jointly controlled with the Nashville, Chattanooga & St. Louis Railway, extraordinary efforts would be put forth by the soliciting representatives and other officers of the Tennessee Central R. R., to secure as much competitive traffic as possible for and from their competitors' terminals. Inasmuch as the primary revenue interests of the Southern Railway, Queen & Crescent, and Illinois Central will be to secure as much traffic as they can for their longer and more remunerative routes, the efforts of the Tennessee Central would be

ably assisted by the numerous soliciting representatives of said lines. These combined efforts will necessarily meet with a considerable degree of success. As a rule, the 'home line' always possesses a measure of strength in the good will of the shippers. The lines of the Illinois Central, Southern Railway and Queen & Crescent cover such a vast amount of territory, that there is a large volume of traffic which is originated by them or which they deliver at stations, local and competitive, reached by their lines. Shippers and receivers on these lines can be much more readily reached by the agents and representatives of said lines, for the purpose of soliciting their traffic or influencing them, than by the representatives of the Louisville & Nashville R. R. or the Nashville, Chattanooga & St. Louis Railway. Shippers and receivers located on the tracks of the latter lines at Nashville, mostly entertain friendly sentiments towards their home lines, nevertheless they are all susceptible to solicitation, and while the representatives of the Louisville & Nashville R. R., as to its shippers hope to continue to receive the major share of their traffic, even under a reciprocal arrangement, we are bound, under the most favorable conditions, to lose a proportion of it."

Another significant feature that bears upon the part that will be played by the Southern Railway system and the Illinois Central, if the Tennessee Central is given access to appellants' terminals, is the fact that the Southern Railway and Illinois Central own the Tennessee Central's terminals at Nashville, title to which is in the name of a corporation called the Nashville Terminal Company. Of this Mr. Smith says:

"It is a matter of common knowledge that the Nashville Terminal Company, which supplies virtually all the terminal facilities of the Tennessee

Central R. R. in the city of Nashville is owned, not by that line, but by the Illinois Central and Southern Railway, jointly or severally, which fact we may assume lends strongly to the interest those lines each may have in routing traffic via the Tennessee Central Railroad."

In this connection we call attention to the error of counsel for appellees in discussing the amount of this loss, when he says, near the conclusion of the discussion of this question, "But the real test of the loss which the appellants would suffer is not the gross revenue from the business which would be diverted, but the net revenue, and this it is estimated would be about \$100,000 per year. (Rec., Vol. 1, p. 45.)"

Counsel here, through evident inadvertence, says that the statement at the page mentioned referred to the aggregate net loss sustained by the two companies. Reference, however, to the citation given will show that it was Mr. A. R. Smith's testimony as to the net loss of the L. & N. alone, amounting to \$106,380. Mr. Barham, at page 55 of Vol. 2, states that the net loss of the N., C. & St. L. would be not less than \$84,150. The sum of these two, representing the total net loss of the two companies, is \$190,530 per annum, which by a typographical error, appears in our original brief as \$192,530. This is about \$16,000 per month.

But if this amount of damage would be suffered by enforcing the order, counsel claims that not to enforce it would cause an equal loss to the Tennessee Central, which has, therefore, lost \$2,000,000 in the past fifteen years and should not lose any more. But this is not a suit by

the Tennessee Central. To its credit be it said that at no time during this long period has it shown a disposition to attempt the manifest wrong of demanding equal enjoyment of the fruits of another railroad's foresight and investment. Counsel attempts to meet this suggestion by the claim that the city of Nashville represents the interests of the Tennessee Central because it is a large stockholder in that company. This desire to build up the Tennessee Central at the expense of the other two roads may be, and doubtless is, the real motive behind this whole proceeding by the city of Nashville, since, besides the Tennessee Central, only those shippers located exclusively on the tracks of the L. & N. or N., C. & St. L. are interested and they very slightly; but the Tennessee Central is a corporate entity with competent officials who are able to look after its interests and with open courts and commissions on all sides to which it can apply for the redress of any grievances it may have.

Here, however, it is not only not a complainant, but was a defendant with the allegation that it, too, was engaged in this nefarious practice of refusing to switch competitive traffic for its competitors—a practice, however, which we are naively told will be discontinued if the other two roads are required to switch for it. The proof shows, however, that the business of the industries on its tracks, which would be open to the other two lines under enforced reciprocal switching, would not be comparable to the business it would get access to upon the terminal tracks of the other two roads. This partial benefit, however, was fully taken into consideration in

the calculation showing the net loss of the appellants hereinabove stated.

#### IV.

**The Power of the Court to Suspend an Order of the Interstate Commerce Commission is Restricted Within Narrow Limits by the Federal Statutes.**

We do not agree with the above statement, except to a limited extent. It is true that the *tribunal* empowered to suspend orders of the Interstate Commerce Commission, composed as it is of three judges, is more important than that which tries ordinary cases; but the principles of law which shall govern it in the exercise of its general equity powers are not prescribed.

Here, however, the same court of three judges, which decided to sustain the Commission's order, also distinctly found that irreparable injury would follow its enforcement.

Counsel stress their claim that this is not a contest between the carriers and shippers but is a proceeding in which the decision of the Interstate Commerce Commission, a quasi-judicial tribunal, is under attack. We can not concede, however, that any particular sanctity on that account attaches to the case. Under the authority cited in our original brief, whose pertinency and binding force are not here questioned, the lower court, sitting as a court of equity, had the power, in its discretion, to enjoin the enforcement of this order of the Commission pending an appeal, notwithstanding it was of opinion that the

order should be sustained. It accordingly suspended the operation of the order, but because of appellees' own insistence that the question of ultimate suspension should be left to the Supreme Court, the lower court limited its order of suspension to a time within which the Supreme Court could pass upon the application for a suspension, pending the appeal, provided the appeal was taken and such application made within thirty days. There is certainly no question about the power of this court to further suspend the order, as was done in *Omaha Street Railway v. Interstate Commerce Commission*, 222 U. S. 582.

But counsel insist that in all the cases cited by appellants, where the lower court or this court granted a stay pending an appeal, there had been a restraining order or interlocutory injunction in effect in the lower court at some time. It will be recalled, however, that in several of these cases the restraining order or interlocutory injunction had been dissolved and was not in force at the time the order of suspension was granted. Assuming it to be true, however, that in each of these cases a restraining order or injunction had at some time been in force, we fail to see how that accidental circumstance can affect the general inherent power of a court of equity to grant this relief when the circumstances demand it. In other words, the mere granting or denial of a restraining order at an early stage of a case can not affect the right of the court, at its conclusion, to do what it deems proper with a motion to maintain the *status quo*. Counsel's suggestion may grow out of the consideration of

Equity Rule No. 74, which authorizes the trial judge in case of an appeal to suspend, modify, or restore an injunction during the pendency of an appeal, but this in nowise militates against the inherent power of a chancellor in advance, but in contemplation, of an appeal, to put in the decree itself such terms regarding the maintenance of the existing status pending an appeal as the interests of justice seem to require.

If, however, the existence of an injunction at some time were essential to the granting of this relief (which we deny), the facts in this case, as stated in our original brief and admitted in appellees' brief, show that there was in force from the day the application for an interlocutory injunction was heard, April 20, 1915, until after the final decision of this case, what amounted, in effect, to a temporary restraining order—the Commission's own action in postponing the effective date of the order even though this was done at the request rather than the order of the court. And if an injunction, actually issued by the lower court, were essential to action by this court, we have that injunction in the lower court's final order, which, by suspending the enforcement of the Commission's order pending the taking of this appeal, in effect enjoined its enforcement. All of counsel's suggestions, then, as to the conditions precedent to this court's action in this matter are met in this case.

Counsel discusses Rule 74 and suggests that it makes no provision for a case where there has never been an injunction. That possible interpretation of the rule was just what deterred us from relying on an application to

the lower court after the granting of an appeal and induced us to make the application at a time when there was no question as to the power of the court to grant it. Further discussion of this question, however, seems unnecessary since counsel shows no authority in opposition to the cases cited in our original brief, which approved this practice, and, of course, none which controverts our contention that this court has plenary power in the matter.

Counsel discusses the issue of the granting of writs of supersedeas by this court, but the very authority cited, *In re McKenzie*, 180 U. S. 549, declares that "there are instances where it has been done under special circumstances and in furtherance of justice." We claim that the circumstances here are special, because of the enormous loss which appellants will sustain, if the order is wrongfully enforced, and the negligible loss to appellees if it is wrongfully suspended; because of the importance and, in a sense, the novelty of the single question here involved; and because the trial court itself has positively declared that this relief should be granted.

Counsel draw fine distinctions in the case of *Omaha Street Railway Co. v. Interstate Commerce Commission*, 222 U. S. 582, where this court suspended the enforcement of an order of the Interstate Commerce Commission pending the appeal, even though the Commerce Court dissolved the injunction. It does not appear in the opinion in that case upon what ground the Commission's order was attacked; and the court did not intimate that it had granted the stay order because the jurisdiction of the

Commission was in question rather than because it was claimed that there was **no substantial** evidence to support the order. In either event, the enforcement of the order would have worked the same injustice and hardship.

Counsel closes his brief with this statement:

"The court of three judges is created for a special purpose and it has only such powers as are specifically conferred. The power of the court to grant a restraining order is limited to an order which does not extend beyond the time of its decision upon the application for an interlocutory injunction. Congress has guarded this with such great care that there is no room for doubt."

We can not agree to this statement. Chapter 32 of the Act of October 22, 1913, to which counsel refers does provide for the procedure in applications for interlocutory injunctions and temporary restraining orders, but beyond that it puts no limits upon the well-recognized general powers of a court of equity. In this case, as we have seen, the granting of the temporary restraining order was unnecessary, because of the Interstate Commerce Commission's own consent to bring about the same result until the case was decided. The application for an interlocutory injunction was denied, but the appellees themselves asked a final disposition of the case upon their answer and motion to dismiss for want of equity. The lower court accordingly did not confine itself to merely passing upon the application for an interlocutory injunction, but, in effect, tried the case upon its merits

and dismissed the bill. In doing this, it had all the powers of any court of equity, among which was the right to impose, as a condition to the decree, an order maintaining the status pending an appeal. The complaint, therefore, that this order of suspension was without authority seems to us wholly unfounded, but if this were not so, we have gotten beyond that stage in the proceedings, as the present inquiry relates solely to the powers of this court even if its exercise does involve the suspension of an order of the Interstate Commerce Commission. As this court declared in the Omaha Street Railway case, *supra*, that it had this power, we fail to appreciate the force of counsel's concluding statement above quoted as to the powers of the lower court in the premises.

We earnestly insist that no substantial reason has been shown why the lower court's partial suspension of this order pending appeal should not be continued in force until the appeal is decided.

Respectfully submitted,

EDWARD S. JOUETT,

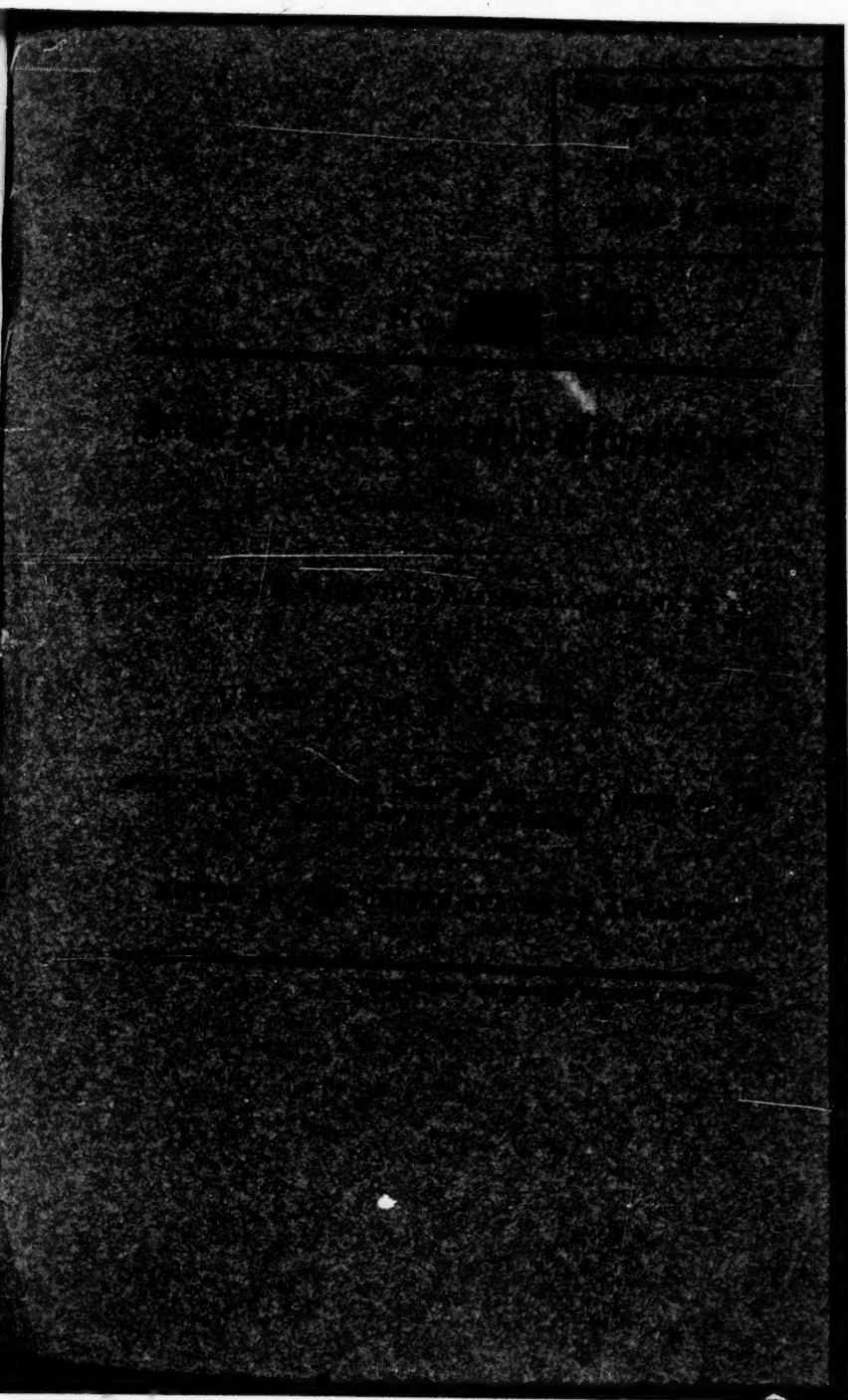
*Solicitor for Appellants.*

H. L. STONE,

W. A. COLSTON,

CLAUDE WALLER,

*For Appellants.*



# In the Supreme Court of the United States.

OCTOBER TERM, 1915.

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LOUISVILLE & NASHVILLE RAILROAD COM- pany et al., appellants, v. UNITED STATES OF AMERICA ET AL.	}	No. 711.
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APPEAL FROM THE DISTRICT COURT OF THE UNITED  
STATES FOR THE MIDDLE DISTRICT OF TENNESSEE.

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## MOTION BY THE UNITED STATES TO ADVANCE.

Comes now the Solicitor General, and, in accordance with the provisions of section 2 of the act of June 16, 1910, 36 Stat. 542, and the Urgent Deficiency Act of October 22, 1913, 38 Stat. 208, 220, respectfully moves the court to advance the above-entitled cause for hearing on a day convenient to the court during the present term.

This is an appeal from a final decree of the District Court of the United States for the Middle District of Tennessee, denying a motion for an injunction against the enforcement of an order of the Interstate Commerce Commission, and dismissing the petition of appellants therefor.

The case involves the question, *inter alia*, whether the rates and practices of the Louisville & Nashville

Railroad Company and the Nashville, Chattanooga & St. Louis Railway, established by agreement between the said companies, affecting the switching of competitive carload traffic at Nashville, subjected to undue and unreasonable prejudice and undue discrimination competitive carload traffic received from and delivered to the Tennessee Central Railroad Company, at Nashville, in violation of section 3 of the Act to Regulate Commerce.

The question is one of importance not only to the railroads and the shipping public generally, but also to the Interstate Commerce Commission in the administration of the Act to Regulate Commerce, and for that reason an early determination thereof by this court is desirable.

Opposing counsel concur.

JOHN W. DAVIS,  
*Solicitor General.*

MARCH, 1916.

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